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ABSTRACT

The arbitration provisions of collective bargaining agreements at unionized colleges and universities were analyzed for a sample of about 89,000 unionized faculty. The following 11 elements were analyzed with respect to frequency in collective agreements and assorted other contractual conditions: (1) time limits for submission of grievances; (2) nature of time delays and the grievance step structure; (3) accelerated grievance procedures; (4) union representation at grievance hearings; (5) types of arbitration boards; (6) selection of arbitrators; (7) scope of arbitrability/exclusions from the grievance procedure; (8) use of documents during arbitration; (9) types of arbitration decisions and precedent setting as defined by contract; (10) limits on power of arbitrators; and (11) payment of arbitrator fees. Over 90 percent of the agreements contained grievance procedures, with 74 percent culminating in binding arbitration. Procedural and structural components inherent in the grievance process are similar to those found in most industrial contracts. While steps may be eliminated to accelerate a grievance, expedited arbitration procedures are not prevalent. The issues of "academic judgment" and "presidential reasons" for adverse personnel actions are briefly discussed. (SW)

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AN ANALYSIS OF THE ARBITRATION CLAUSE IN COLLECTIVE BARGAINING AGREEMENTS IN HIGHER EDUCATION

Editor's Note: A somewhat shorter version of this article by Joel M. Douglas first appeared in the December 1984 issue of the Arbitration Journal (see Vol. 39, No. 4, pp. 38-489.) Those interested in the actual contracts and BRAIN data utilized in this study are requested to contact the Center.

INTRODUCTION

Arbitration of faculty grievances on unionized campuses has produced a body of case law, practice, customs, and rules that, upon examination, is similar to that found in virtually every other unionized employment relationship. Although there are distinctions between arbitration as practiced in higher education and in the industrial sector, these differences are minimal.[1] This is not to say that the industrial model has been completely superimposed on academe, for differences, most significantly in the limits of the arbitrator's power to review management decisions, do exist.[2]

The widespread use of binding arbitration on unionized campuses suggests that decision-making responsibility, once thought to lie within the exclusive domain of the academy of self-governing scholars, is now being shared with third-party neutrals, thus significantly changing college governance procedures.[3] In making decisions, administrators must now be cognizant of contractual requirements, as numerous aspects of governance are increasingly being codified into the labor agreement.

Grievance arbitration is firmly established at unionized colleges and universities and is also found on nonunionized campuses. One explanation for its role in the unorganized sector is that grievance procedures serve as a vehicle for either preventing unionization or institutionalizing an employee mechanism to ventilate alleged unfair employment practices. While the number of nonunionized institutions with faculty grievance procedures culminating in binding arbitration remains small, it is expected that the figure will grow as arbitration gains wider acceptance in these employment relationships.

It has been further suggested that not only will there be an increase in the number of cases brought to arbitration, but the range of subject matter will also be extended. Disputes involving academic freedom and First Amendment issues will be increasingly placed before arbitrators instead of being adjudicated in the courts.[4]

RESEARCH DESIGN AND METHODOLOGY

While researchers acknowledge the importance of arbitration, they have spent little time analyzing the structural components, procedural applications, and substantive elements of the arbitration clause in higher education collective bargaining. No attempt was made in this study to examine the substantive elements of the grievance process or the conflict inherent in faculty unionism (that is, collegiality versus collective action). The issue of peer review judgment juxtaposed upon dual faculty governance procedures, faculty senates, and bargaining agents is a subject in need of further research. Rather, the purpose here was to analyze the arbitration provisions of collective agreements on unionized college and university campuses and to set forth the findings with a view toward practical applications.

The research design and methodology employed involved use of the data base developed by the Baruch College National Center for the Study of Collective Bargaining in Higher Education and the Professions (NCSCBHEP). Through the use of BRAIN (Baruch Retrieval of Automated Information for Negotiations),[5] the arbitration and grievance clauses of 129 unionized college and university collective bargaining agreements were selected for contract analysis. NCSCBHEP statistics as of January 1, 1984, identify 417 unionized institutions on over 800 campuses.[6] The 417 figure represents elected bargaining agents, not all of whom have negotiated collective agreements.[7] The total number of unionized faculty is slightly less than 200,000. The contract data base was drawn to ensure representation with respect to the following variables: unit size, bargaining agent, institutional classification, and geographic region. The sample covered approximately 89,000 unionized faculty.

The selected clauses were further broken down into components according to the number of employees covered by each contract condition, geographic distribution, and agent identification. Each of the 11 descriptors was analyzed with respect to frequency in collective agreements and assorted other contractual conditions, and was summarized from both a statistical and narrative point of view. The descriptors analyzed were: 1) time limits for submission of grievances; 2) nature of time delays and the grievance step structure; 3) accelerated grievance procedures; 4) union representation at grievance hearings; 5) types of arbitration boards; 6) selection of arbitrators; 7) scope of arbitrability/exclusions from the grievance procedure; 8) use of documents during arbitration; 9) types of arbitration decisions and precedent setting as defined by contract; 10) limits on power of arbitrators; and 11) payment of arbitrator fees.

Not every contract contained all 11 components; the classification "no provision" was utilized to code that condition. If a contract condition was located that did not appear in the BRAIN classification, the code "other" was entered. Where contract language was vague, the condition "not specified" was used.

"ACADEMIC JUDGMENT"

To fully comprehend the complexities of arbitration in higher education, one must first have an understanding of the somewhat amorphous, yet sacrosanct term, "academic judgment." It is within this area that most of the peculiarities and problems associated with arbitrating grievances in academe have been found. Academic judgment may be defined as the routine use of collegial peer review and recommendations to appropriate administrative officials. It has been further suggested that ". . . academic judgment is surrounded by a mystique which has made it unassailable. It is said to be the collective judgment of the College and, therefore of one's peers. One should not question the judgment which is said to be the consensus of one's colleagues."[8]

The collective bargaining agreement between the Professional Staff Congress (PSC) and the City University of New York (CUNY) defines "academic judgment" as:

> the judgment of academic authorities (including faculty,. . .) (1) as to the procedures, criteria to appointment, reappointment, promotions and tenure and (2) as to whether to recommend or grant appointment, reappointment, promotions and tenure to a particular individual on the basis of such procedures, criteria and information. In the arbitration of any grievance of action based in whole or in part upon such academic judgment, the Arbitrator shall not review the merits of the academic judgment or substitute his own judgment therefore provided that the Arbitrator may determine (i) that the action violates a term of this Agreement, or (ii) that it is not in accordance with the By-laws or written policies of the Board, or (iii) that the claimed academic judgment in respect of the appointment, reappointment, promotion or tenure of a particular individual in fact constituted an arbitrary or discriminatory application of the By-laws or written policies of the Board.[9]

The first CUNY agreement, dated September 1969 through August 1972, contained what is believed to have been the first academic judgment clause in any higher education labor agreement.[10] Therefore, not unexpectedly, a substantial part of the case law concerning arbitration of this issue arose from CUNY contracts.[11]

Much debate has been generated over the distinction between academic judgment and due process violations, with the general consensus being that although differences between the two are often clouded, arbitrators should not intrude into a review of academic judgment. Yet, the mystique surrounding this issue has been somewhat lessened.

Closely related to the academic judgment question is that of "presidential reasons."[12] Those unfamiliar with the workings of the academic world are often surprised at the lack of substantive rights concerning reappointment afforded nontenured faculty. Probationary appointments are usually for one year,with no presumption of reappointment. College presidents generally are not required to give any reasons for their decisions not to reappoint. The 1972-1975 CUNY agreement contained language that significantly eroded a prior "presidential no reasons" clause.

The question of presidential reasons for adverse personnel actions remains among the most difficult in arbitration today—the reasons required being those of the appointing authority, that is, the college president, and not those of a peer review committee. Thus, it may no longer suffice for the president to say, "I concur with the decision of the personnel and the tenure committee." His or her reasons must be based on independent, demonstrated knowledge and must be supportable. Arbitrator Maurice C. Benewitz finds that "an unusual feature of academic agreements is that they provide so little protection in the area of substantial personnel actions which would at least be reviewable in many other areas. These actions are appointment, retention, promotion and tenure."[13]

Concerns about arbitration in higher education and its viability as an instrument of conflict resolution and contract administration have been raised by Frank R. Kemerer and J. Victor Baldridge in their book, Unions on Campus.[14] They suggest that (1) the scope of arbitral review must be clearly defined, (2) the powers of remedy available to the arbitrator must be carefully specified, and (3) institutions must experiment with different arbitral models.

Nearly a decade has passed since these principles were first set forth, a time period in which not one of these principles has emerged as the standard for arbitration in academic collective bargaining. The scope of arbitral review is still clouded with myriad procedural and substantial claims, which in turn are intermingled. The remedy issue continues to plague grievants, advocates, and arbitrators, as numerous questions remain unanswered. The call for experimentation with different arbitration models has been ignored. The two experimental models that have been introduced--select panels and final-offer arbitration—are not used on the majority of campuses. Little evidence of any creative approaches was found while analyzing the contract data base in this study. Innovative techniques, however, may exist on individual campuses where contract language and contract implementation are not synonymous. Absent a campus-by-campus contract administration survey, it would be misleading to rely on contract language alone to verify this premise. Nonetheless, arbitration still remains a conservative process with the parties relying, to a large degree, on the procedural models developed in the industrial sector some 50 years ago.

1) TIME LIMITS FOR SUBMISSION OF GRIEVANCES

Procedural criteria for the submission and processing of grievances are found in 97 percent of the academic collective bargaining agreements surveyed in this study. The parties have long realized that a well-ordered, carefully structured, delineated framework enures to the benefit of all. Essential to the procedure is a specified triggering mechanism that initiates the grievance process. For purposes of this study, a triggering mechanism may be defined as that event that gives rise to the action being grieved. Three types of such mechanisms were found that were used to start the grievance clock. The first began at the actual date of the occurrence of the event being grieved, the second at that time period when the grievant "should have known" of the alleged violation, while the third referred to continuing, ongoing violations.

Eighty-seven percent of the contracts surveyed contained specified time limits in which grievances had to be submitted to be considered timely. The most common grouping was a period of 11 to 30 days, with 63 percent of the sample falling in that category. Fifteen percent required grievances to be submitted within ten days, 7 percent within 31 to 60 days. Two contracts provided for a 61- to 90-day submission period, with another two allowing in excess of 90 days. One contract called for a "reasonable time" to submit, while five had alternative provisions. Four contracts were silent on this issue.

In spite of the drafting of precisely worded contract clauses, time limit questions remain. One such problem, unique to higher education labor relations, concerns time limit applications to grievances involving adverse personnel actions. Does one grieve the actual notice of termination or nonreappointment or would that be considered premature? Is the actual layoff the only action that is grievable? It is questions such as these that make time limit problems more than routine computational exercises.

2) NATURE OF TIME DELAY

While contractual time limits for grievance processing are found in the vast majority of higher education labor agreements, 69 percent of the contracts surveyed included provisions in which discretion was permitted in the application of time limits. In most of these instances, however, mutual consent was required to deviate from the proscribed time limits. The data appear to suggest that the parties are aware of the need for specified time limits as a means of contract management, while they have at the same time acknowledged the need for enlarged time spans within the grievance step structure. The pragmatic application of this practice is analogous to a "built-in hold" during which time the parties can either gather additional data needed to process the grievance or seek relief in some other forum. This procedural delay further supports the settlement concept whereby the parties negotiate a resolution to the grievance in the presence of a newly imposed time limit deadline.

Eleven percent of the contracts mandated the imposition of the time limit framework with no discretion discernible. Two percent permitted grievance steps to be omitted, while 8 percent had other means of addressing this issue. Ten percent of the contracts surveyed were silent on the issue. None contained provisions whereby grievances could be heard on their merits regardless of time limit violations. Although data were not available in BRAIN to support this concept, experience suggests that parties often waive the preliminary steps of the grievance process, preferring to move immediately to arbitration in order to resolve the issue.

3) ACCELERATED GRIEVANCE PROCEDURES

Directly related to the time limits issue is the question of accelerated grievance procedures. Accelerated grievances are those that the parties might desire to process more quickly because of the novelty of the claim. Examples for which accelerated grievance procedures were found include: (1) grievances arising from a higher authority than the immediate supervisor, (2) group or class action claims, (3) grievances involving union and/or policy issues, and (4) grievances concerning discharge.

These types of grievances must be distinguished from those diverted into expedited arbitration, a separate procedure often negotiated to handle such claims. The frequency of arbitration in higher education thus far, however, has not been

such as to warrant the creation of special expedited procedures similar to those found in the U.S. Postal Service, Veteran's Administration, the railway industry, and various civil service commissions.

The percentage of contracts containing accelerated grievance procedures for the following conditions was as follows: (1) grievances arising from a higher authority than the immediate supervisor (8 percent), (2) group or class action claims (5 percent), (3) union or policy claims (6 percent), and (4) discharge (7 percent). Another 17 percent had provisions for grievance acceleration when two or more of the above conditions existed. Five percent allowed acceleration on virtually any issue as long as mutual agreement was obtained. An additional 10 percent had conditions other than those listed above for grievance acceleration. Nearly half of those surveyed (42 percent) contained no mention of accelerated grievance procedures in their collective bargaining agreements.

Flexibility, coupled with divergence of opinion, clearly exists with respect to this issue. Those parties that desire accelerated procedures have provided for them, while nearly as large a group have elected silence or have preferred to resolve the issue within the bounds of the grievance procedure itself.

4) UNION REPRESENTATION AT ARBITRATION

The question of union representation at the arbitration and the ownership of the grievance is addressed in Descriptor No. 4. This matter is especially significant in higher education labor contracts, since there still exists widespread debate over faculty unionization and the role of concerted action for professionals. Faculty unions have fought and have won the right in the majority of the contracts identified to be present and argue grievances to ensure the protection and integrity of the agreement.

With the development of the concept of the duty of fair representation, the obligations of the union in the grievance procedure have been significantly increased. Indeed, some faculty unions now maintain that it is cheaper and safer to take all cases, including "sure losers," to arbitration, despite the costs and time involved, rather than incur the possibility of lawsuits and adverse judgments.[15]

Ninety-five percent of the contracts surveyed contained language of some type relating to union representation at grievance and arbitration hearings. The following groupings concerning the unions rights in this matter were identified: (1) right to argue at all stages (20 percent), (2) sole right to argue at all stages (3 percent), (3) right to argue at some but not all stages (7 percent), (4) sole right to argue at some but not all stages (6 percent), (5) right to be present and may have right to argue (25 percent), (6) right to be present but unspecified as to who argues (5 percent), and (7) right to be present at some but not all stages (5 percent).

Twenty-one percent of the contracts permitted the grievant to make the choice as to the union's presence. No data, however, are available in BRAIN as to how often or under what circumstances that option is exercised. Three percent of the survey had other provisions with respect to this issue. Five percent of the survey was silent on this issue.

Although union presence at grievance and arbitration hearings appears to be widespread, questions still remain as to who has the right to argue the case in specified situations. Thus, it is clear that the question of the union's right to be present at the grievance hearing transcends procedural issues and is of greater importance since the advent of recent duty of fair representation case law.

5) TYPES OF ARBITRATION BOARDS

The majority of the contracts, 77 percent, specified a single impartial arbitrator to hear faculty grievances; 6 percent relied on tripartite arbitration boards, while 2 percent allowed a choice of umpire or board. Variations existed within the structure of the tripartite board concerning the (a) authority of the board, (b) voting procedures, (c) the rule of unanimity. (d) right of the chairman to cast votes, and (e) majority rule.

While no data exist in BRAIN as to the functioning of tripartite arbitration boards in higher education, experience in other industries suggests that advocate arbitrators often adopt their clients' positions, necessitating the impartial chairman to cast the decisive 2-to-1 vote.

Fifteen percent of the contracts surveyed made no reference to the type of arbitration board. Tripartite boards are in the minority and most faculty grievances are heard by one arbitrator serving as an impartial umpire on an ad hoc basis.

6) SELECTION OF THE ARBITRATOR

The American Arbitration Association (AAA) was named as the administrative tribunal agency in most faculty collective bargaining agreements administering the arbitration process. Nearly one-third of the contracts (31 percent) named the AAA, 7 percent specified Public Employment Relations Boards (PERBs), and 4 percent indicated the Federal Mediation and Conciliation Service (FMCS). Thirteen percent of the contracts were not specific as to agency designation. Here, mutual consent was the primary criteria in the selection process.

Twenty-four percent of the agreements provided for a choice of alternatives in the selection process, including choosing arbitrators from either the AAA, a PERB, FMCS, or some similar agency. It has been found that many of the experienced arbitrators are listed by the AAA as well as by other arbitration agencies and thus the same names are likely to appear no matter which is designated.

Only 4 percent of the contracts provided for a permanent panel of arbitrators. These panels are designed to develop continuity and consistency and ensure expertise. They are generally renegotiated at the end of the contract. Six percent of the survey utilized procedures other than the ones mentioned above, while 9 percent were silent on this issue.

Only two contracts required that the arbitrator have prior experience in arbitrating higher education issues. This is consistent with the industrial model wherein the arbitrator need not possess expertise in the subject matter in order to be selected to hear cases in an industry. Thus, it appears that the vast majority of higher education arbitration cases are heard by single, ad hoc arbitrators selected to hear grievances on a case-by-case basis with selection procedures similar to those found in the industrial model.

7) SCOPE OF ARBITRABILITY/EXCLUSIONS FROM THE PROCEDURE

The question of the scope of arbitrability is addressed in Descriptor No. 7. Crucial to the arbitration process is the grievance definition and scope of exclusions. Arbitration clauses are normally classified into two groupings: broad and narrow. The broad clause permits grievances to be filed on all terms and conditions of employment, both covered in the contract, as well as those external to the agreement, while the narrow grievance definition restricts grievance filing to only alleged contractual violations.

Sixty-seven percent of the sample contained some form of narrow grievance definitions, while 26 percent provided for broad inclusive coverage. Both the broad and narrow clauses included restrictions and exclusions from the scope of arbitration. Excluded subjects included promotion, renewal of contract, denial of tenure, dismissal for cause, layoff, and financial exigency. The most frequently found exclusion concerned personnel and promotion actions (21 percent). Ten percent of the agreements excluded dismissal for cause, while an additional 6 percent removed financial exigency questions from the arbitrator.

These exclusions were often coupled with others. Certain contracts, for example, excluded dismissal and financial exigency questions. Thus, these percentages cannot be regarded as absolutes. Five percent of the contracts either did not address this issue or contained other procedures for addressing exclusions.

Most academic contracts contain provisions that arbitrators cannot substitute their judgment for that of the employer and the only grounds grievants have for the submission of grievances arising from unsatisfactory personnel actions are procedural. There remains considerable controversy on this issue within the academic collective bargaining community as to whether the "reasons" given for unsatisfactory personnel decisions are grievable. Arbitrators tread on soft ground when hearing these cases, for it is apparent that the issue of reasons may reach the area of academic judgment. Thus, the issue often goes full cycle: a professor grieves a failure to renew; he or she argues procedural violations; the university responds that these are not procedural issues, but in reality are academic judgment questions and are not properly before the arbitrator. Solomon-like (or Kafkaesque) wisdom is needed to adjudicate these issues.

Some institutions have addressed the problem of grievances arising from adverse personnel actions by creating select panels including peers from outside the affected university, to reexamine these issues and make binding determinations for the resolution of the grievance. It appears that the number and type of topics excluded from the scope of arbitration in academic collective bargaining is greater than in other industries. Absent the existence of other data bases, however, this observation is speculative at best.

8) USE OF DOCUMENTS DURING ARBITRATION HEARINGS

The vast majority of the contracts surveyed (85 percent) contained no provision either permitting or excluding the use of documents during arbitration hearings. Of those that did contain language, 6 percent allowed the union the right to receive documents prior to the hearing, with another 2 percent allowing the arbitrator to order the production of such documents. Seven percent of the contracts had other methods of resolving this issue. Questions concerning the use of documents are often resolved by statute relating to the Freedom of Information Act and the subpoenaing of witnesses and documents.

9) TYPES OF ARBITRATION DECISIONS AND PRECEDENTIAL VALUE

Descriptor No. 9 addresses the issue of the finality of the arbitration award, as well as the question of precedential value. Awards are presumed to be binding upon the parties unless a specific exemption has been negotiated to the contrary.

Seventy-four percent of the contracts surveyed specified that the award of the arbitrator will be final and binding in all cases. This included three percent that provided for finality only when the issue raised concerned alleged procedural violations. Eight percent of the agreements

provided for advisory arbitration awards, while 9 percent had arbitration clauses that were grouped as "other." Nine percent of the contracts contained no arbitration procedures. These agreements, however, did contain grievance mechanisms culminating in board of trustees' determinations.

The question of the precedential value of arbitration awards was directly addressed in only three contracts. But the absence of contract language should not be construed as support against the precedent concept. Arbitrators are not bound by the decisions of other arbitrators or, indeed, even by their own previous awards (although the doctrine of stare decisis suggests that awards issued on the same issue will be viewed as controlling). Similarly, the concept of res judicata prohibits the parties from litigating the merits of the same event or incident. Both stare decisis and res judicata have long been used by arbitrators as a standard even though labor agreements might not specify their operability.

10) LIMITS ON THE POWER OF THE ARBITRATOR

Descriptor No. 10 sets forth provisions concerning explicit limmits on the power of the arbitrator or arbitration board. The majority of the contracts, 71 percent, contained the standard exclusionary language forbidding the arbitrator to add to, subtract from, alter, amend, or disregard any provisions of the collective agreement. Five percent of the agreements specifically forbade the arbitrator from ruling on questions of academic judgment, while only 2 percent specifically allowed the arbitrator to address academic judgment questions. An additional 5 percent had other restrictions imposed on the arbitrator. Sixteen percent of the contracts were silent.

Most private and public sector labor relations statutes, as well as state and federal arbitration codes, recognize the "exceeding of authority" restriction as a standard to be used when ruling upon a motion to vacate an arbitrator's award and thus this restriction in the agreement often has post-arbitration significance.

Should either party seek to have an arbitrator's award vacated, an action whereby a court of competent jurisdiction will set aside said award, the most common ground is that the arbitrator exceeded his authority. Other grounds relied upon to vacate awards include: (a) fraud or misconduct by the arbitrator, (b) arbitrator partiality, (c) gross unfairness throughout the arbitration proceedings, (d) violation of public policy, (e) ordering the commission of an unlawful act and (f) lack of jurisdiction by the arbitrator.

Although the grounds for vacating an award may be delineated in both the collective agreement and appropriate statutes, the number of awards vacated are minimal.[16]

The New York State provision which provides for the vacating of arbitrators' awards is representative of other such state statutes. Set forth below are the salient points of Sections 7501 - 7514 of the New York State statute:

> 9. An award of an arbitrator may be vacated by a party who makes a request to vacate within ninety (90) days and who was a party to the hearing or who was given notice of the intent to arbitrate if he can show that his rights have been prejudiced by:
>
> a) Corruption or fraud in procuring the award.
> b) A finding that the arbitrator was partial and did not live up to his office as a neutral.
> c) The arbitrator exceeds his authority or rendered an award which did not decide the issue with finality.
> d) The arbitrator failed to follow the procedures of the statutes and was not excused from such compliance by the willingness of the party requesting that the award be vacated to continue with the hearing.
>
> 10. The award shall be vacated by a party who was not a party to the proceeding nor who was given notice of intent to arbitrate if the Court finds:
>
> a. The rights of the party were prejudiced by any of the grounds set forth in (a) through (d) of No. 9 above.
> b. A valid agreement to arbitrate the issue was never made.
> c. The provisions of the agreement to arbitrate had not been complied with.
> d. The issue to be arbitrated was not processed within the time limits in which actions brought before a court of the state must be processed. . .[17]

In addition to the above-stated criteria, the BRAIN search revealed three additional areas in which the arbitrator's powers and jurisdiction are contractually limited. They included (a) ruling on substantive issues where the contract expressly limited findings to procedural matters only, (b) ruling on questions of academic judgment where restrictions had been negotiated, and (c) substituting or altering disciplinary penalties when such powers were not expressly granted.

Upon a motion to vacate an award, the opposing party generally moves for a confirmation of said award by obtaining a judgment of the court. It should be noted, somewhat parenthetically, that

the original intent of the arbitration process was to limit the intrusion of the judiciary in the labor relations process. Reliance on the courts to vacate and/or confirm awards appears to be both countercyclical and counterproductive.

Descriptor No. 10 is directly related to Descriptor No. 7, the scope of arbitrability and exclusions from the grievance procedure; these two must be considered together when analyzing such clauses.

11) PAYMENT OF ARBITRATOR FEES

Of those contracts that contained provisions concerning the payment of arbitrator fees, 82 percent mandated a 50-50 prorated formula. This concept is the traditional one in the industrial sector and is also set forth in the Voluntary Labor Arbitration Rules of the American Arbitration Association. Eleven percent of the sample contained no provision for arbitrator payments. It is assumed, however, that if the AAA is specified in the labor agreement, the 50-50 formula will be followed. Two percent provided for the losing party to pay the arbitrator's complete fee, while another 2 percent mandated that the employer pay the costs in certain types of cases. Three percent had other payment procedures related to the type of case.

A substantive issue concerning pro-rated formulas for the payment of arbitrators' fees revolves around the use of the arbitration forum as an economic weapon against a financially strapped union. In these situations, finances control the grievance procedure as decisions are made on economic grounds rather than the merits of a particular case.

A second issue relating to the question of arbitrators' fees concerns the scheduling of arbitration hearings as a device to force discussion of the grievance. The term "escalation scheduling" is used to describe those situations in which arbitration hearings are scheduled and thus the arbitration hearing date itself becomes the pressure point used to achieve settlement. This tactic is often successful as negotiations conducted within the framework of an impending deadline are more likely to conclude in a settlement than those in which no time constraints are present. Arbitrators are aware of this device and have resorted to increasing the cancellation notification time period prior to the scheduled hearing during which time a cancellation fee will be charged for adjourned hearings. In the broadest sense, the use of "escalation scheduling" may be viewed as part of the grievance and arbitration process itself.

SUMMARY AND CONCLUSIONS

Arbitration as a means of resolving faculty grievances is well established on unionized campuses. Over 90 percent of the agreements analyzed contained grievance procedures, with 74 percent culminating in binding arbitration. With few exceptions, the arbitration of faculty grievances is not distinguishable from its industrial relations counterpart. Arbitrators are selected from the same administrative agencies that provide selection and appointment lists for use in other unionized settings and neutrals are not required to have prior experience or demonstrated expertise in arbitrating higher education disputes. The uniqueness of academic collective bargaining, at least with respect to the grievance and arbitration process, is not supportable.

Procedural and structural components inherent in the process are similar to those found in most industrial contracts. Although strict adherence to negotiated time limits are required, provisions exist for mutual waivers. Steps may be eliminated in order to accelerate a grievance. At the same time, expedited arbitration procedures are not prevalent. Fees are split between the parties, with ad hoc arbitrators serving for the most part.

Provisions for vacating arbitration awards are extremely rare. Judicial review of arbitral decisions has been primarily confined to cases where it has been alleged that the arbitrator exceeded the specified contractual authority. Inquiries relating to the arbitrability of grievance claims are reserved to the arbitrator. The scope of review of arbitration decisions appears highly restrictive.

The issue of academic judgment remains a source of conflict. Contract language suggests that arbitrators have jurisdiction on procedural claims only, but the question as to what decisions fall under the academic judgment cloak and are immune from review is an open one. A related problem concerns the granting and subsequent grieving of presidential reasons for unsatisfactory personnel actions. Again, as in academic judgment questions, the presumption is restrictive; unless language specifically authorizes the grieving of presidential reasons, they are considered to be beyond the scope of the grievance procedure.

Research is needed to identify the types of actions grieved to ascertain whether patterns are distinguishable. If certain categories of contract clauses appear to generate a greater frequency of grievances, then attempts can be made to minimize the risk of conflict in these areas. Experimental grievance arbitration programs should be initiated and utilized as ongoing laboratory experiments to refine the process and determine if, perhaps, a new arbitration model unique to higher education labor relations should be developed.

FOOTNOTES

1. For a discussion of the relationship between the industrial model of arbitration and arbitration in higher education, see Maurice C. Benewitz, "Arbitration in Higher Education: Is Academic Arbitration Sui Generis?," Proceedings of the Ninth

Annual Conference (New York: NCSCBHEP, 1981), pp. 61-66.

2. For a discussion on the limits of the arbitrator's powers, see Descriptor Nos. 7 and 10.

3. For further reading on the relationship between college governance and collective bargaining, see Barbara A. Lee, "Contractually-Protected Senates at Four-Year Colleges," Proceedings of the Ninth Annual Conference (New York: NCSCBHEP, 1981), pp. 56-61; Frank R. Kemerer and J. Victor Baldridge, "Senates and Unions: Unexpected Peaceful Coexistence," Journal of Higher Education 52 (May/June 1981): 256-264; and Joel M. Douglas, "The Impact of Collective Bargaining on Governance," PERS Information Bulletin (January/February 1979).

4. See June M. Weisberger, Faculty Grievance Arbitration in Higher Education: Living with Collective Bargaining (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, 1976).

5. See BRAIN Coding Manual for Faculty Contracts (New York: NCSCBHEP, 1981).

6. The reason for the variance between unionized institutions and campuses is explained by the presence of multicampus systems that may have numerous campuses covered by a single labor agreement.

7. For a statistical analysis and listing of unionized institutions, see Joel M. Douglas with Lorraine DeBona, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education (New York: NCSCBHEP, 1984).

8. Benjamin Wolf, "The Gray Area Between Due Process and Academic Judgment," Proceedings of the Eighth Annual Conference (New York: NCSCBHEP, 1980), p. 131.

9. Collective Bargaining Agreement between the City University of New York and the Professional Staff Congress, 1982-1984, Article 20.5, Special Arbitration Procedures (b), p. 32.

10. For a perspective of the CUNY experience with academic judgment and the issue of reasons, see Bernard Mintz et al., "In the Defense of Academic Judgment: Settling Faculty Collective Bargaining Through Arbitration," Buffalo Law Review 22 (Winter 1973): 523-544; and Esther Liebert, "Faculty Accountability--Reality or Fantasy?." Proceedings of the Eighth Annual Conference (New York: NCSCBHEP 1980), pp. 103-120.

11. For an analysis of arbitral case law arising from the CUNY contract, see The City University of New York Index, Digest and Tables of Arbitration Court Cases Arising Under Collective Agreements Covering Instructional Staff (New York: NCSCBHEP, January 1974); and Daniel Kaminker, Professional Staff Congress Review of Arbitrations and Digest of Selected Related Issues (New York: NCSCBHEP, 1984).

12. For a detailed analysis of the presidential reasons question and case law on this issue arising from the CUNY contract, see Kaminker, op. cit.

13. Maurice C. Benewitz, op. cit., p. 63.

14. See Frank R. Kemerer and J. Victor Baldridge, Unions on Campus (San Francisco: Jossey-Bass, 1979).

15. See Humphrey v. Moore, 375 U.S. 335 (1964); Vaca v. Sipes, 386 U.S. 171 (1967); DeArrovo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281 (1970); and Bowen v. U.S. Postal Service,—U.S.—, 103 S.Ct. 588 (1983).

16. Frank Elkouri and Edna A. Elkouri, How Arbitration Works (Washington, D.C.: BNA, (1973) p. 37.

17. State of New York Civil Practice Laws and Rules (CPLR) Sections 7501 - 7514.

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